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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALBERT SHIELDS, JR., HEIR OF
ALBERT SHIELDS, SR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 4, 1983

QUESTIONS PRESENTED

1. Did the court of appeals err in concluding that an Alaska Native, whose parents and grandparents intensively used a small parcel of land long prior to a national forest withdrawal and who himself used the land since a time eleven years subsequent to the withdrawal, could not receive a trust allotment for the land where the applicable statute stated that an allotment is permitted in a national forest "if founded on occupancy of the land prior to the establishment of the particular forest?"

2. Did the decision of the court of appeals violate rules of statutory construction expressed by this Court in *Udall v. Tallman*, 380 U.S. 1 (1965), and *Watt v. Alaska*, 451 U.S. 259 (1981), by:

(a) refusing to defer to the contemporaneous construction of a statute by high officials charged with its administration because that construction was not "published," and

(b) deferring to non-contemporaneous construction by an intra-agency review board which conflicted with prior contemporaneous construction by the agency?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Albert Shields, Jr., heir of Albert Shields, Sr., for himself and on behalf of a certified class of over 200 Native allotment applicants,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 7, 1983.

OPINIONS BELOW

The opinion of the court of appeals, reported at 698 F.2d 987 (9th Cir. 1983), appears in the Appendix hereto at App. 2a-9a. The opinion of the District Court for the District of Alaska is reported at 504 F. Supp. 1216 (D. Alaska 1981). The administrative decision is reported at 23 I.B.L.A. 188 (Jan. 5, 1976).

JURISDICTION

The judgment of the court of appeals was first entered on November 10, 1982. A timely petition for rehearing was filed with that court. On February 7, 1983, the court of appeals withdrew its earlier memorandum decision and substituted a new opinion. At the same time it denied the petition for rehearing. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of the Alaska Native Allotment Act, 34 Stat. 197 (1906) as amended by the Act of August 2, 1956, 70 Stat. 954

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[1] The class is defined at App. 4a. Respondent parties not listed in the caption include the Secretary of the United States Department of the Interior and the Secretary of the United States Department of Agriculture.

(formerly codified at 43 U.S.C. § 270-2 (1970)), repealed but with a savings clause for pending applications, 43 U.S.C. § 1617 (Supp. 1982):[2]

> Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

STATEMENT OF THE CASE

Albert Shields, Sr. was an Alaska Native, born January 25, 1915. App. 3a. This petition concerns his application under the Alaska Native Allotment Act for an allotment of 160 acres of land within the exterior boundaries of the Tongass National Forest.

The land for which Albert Shields applied—located on the Thorne Arm of Revillagigedo Island—was withdrawn by Presidential Proclamation on February 16, 1909. 35 Stat. 2226 (1909). The parcel of land had been used by his ancestors and forebears in the Bear and Wolf Clans since the 1700's. CR 27, ex. 7.[3] In the nineteenth century his grandfather lived on the land, where he built a smokehouse and log cabin. Similarly, his mother and father lived and subsisted on the land. CR 27, ex. 8. Albert Shields, Sr. began to use the land in 1920 at the age of five. *Id;* App. 3a. From that time until ill health confined him to his home in 1976, he used the land seasonally for trapping, fishing, hunting, and picking berries. CR 27, ex. 7. Since 1976 the land has been used in the same way by his sons. *Id.*

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[2] The entire text of the Alaska Native Allotment Act, as amended, is set out in the Appendix at 10a.

[3] "CR" references the portion of the clerk's record on file with the Ninth Circuit where the factual support for a particular statement may be found.

Under the 1956 amendments to the Alaska Native Allotment Act, an allotment is permitted on national forest land "if founded on occupancy of the land prior to the establishment of the particular forest." Act of August 2, 1956, 70 Stat. 954. Petitioners contend that by this language Congress intended to permit allotments on land within national forests where the applicant could demonstrate an unbroken chain of Native use and occupancy of the particular parcel of land since a date prior to the forest withdrawal. Although the government agreed with this construction at the time of enactment of the statute, it has, since the mid-1970's, permitted allotments only where the applicant could demonstrate personal use prior to the withdrawal. This lawsuit will determine the proper construction of that phrase and thus the fate of the allotment applications of Albert Shields, Sr. and some 200 other Native applicants.

The Alaska Native Allotment Act as enacted in 1906 provided simply that an Alaska Native, who was 21 years of age and a resident of the territory, was entitled to apply for an allotment of 160 acres of non-mineral land. The allotted land was to be inalienable and nontaxable. Though the Act worked after a fashion, the provision regarding alienation created difficulties. It tended to render the property worthless where the allottee moved or where he died and the heirs did not wish to live on the property. H.R. Rep. No. 2534, 84th Cong., 2d Sess. 2-3 (1956) (hereinafter "House Report"). To remedy this problem a bill was proposed in 1956 to provide for the alienation of Native allotments with the approval of the Secretary of the Interior. *Id.* Accordingly, on April 16, 1956, House Bill 10505, which addressed only the issue of alienation, was introduced by Delegate Bartlett of Alaska.

The House Subcommittee on Territories, however, apparently feared that permitting alienation might encourage some Natives to *seek* allotments in the national forests for the purpose of selling them. Therefore it proposed a "clean" bill which included amendments designed to obviate that concern. House Report at 3; *see* H.R. 11023, 84th Cong., 2d Sess. (1956).

Upon review the Department of the Interior recommended a substitute bill,[4] which it felt addressed the subcommittee's concerns with more technical precision. Letter of June 7, 1956, House Report at 3-4. This bill, H.R. 11696 (CR 27, ex. 15), was adopted as proposed and became law. 102 Cong. Rec. 13,916 (1956).

In sections 2 and 3 of the enacted bill, Congress provided:

> Sec. 2. Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.
>
> Sec. 3. No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

Act of August 2, 1956, 70 Stat. 954.

The legislative history relating specifically to the language of these two sections is relatively brief. The Department of the Interior, in its June 7, 1956, letter accompanying the proposed bill, stated:

> Subsection (e) of the enclosed substitute bill [Sections 2 and 3 of the amendatory Act] contains the subcommittee recommendations that are designed to safeguard the national forests. Some fear was expressed during the subcommittee hearings that the

[4] The text of the substitute bill, which includes the phrase at issue in this lawsuit, was suggested in a May 23, 1956 Memorandum from the Director of the Bureau of Land Management to a Mr. Sigler, legislative counsel in the Office of the Solicitor.

> authority to sell homesteads might encourage Indians and Eskimos to seek homestead allotments in the national forests for the purpose of selling them to others. This danger is effectively obviated by enacting into law the substance of the Department's present regulations on the subject, which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

House Report at 4.

The House Report which accompanied House Bill 11696 followed the sense of the Department's letter by stating that the provisions of subsection (e) were necessary to protect the national forests:

> Subsection (e) safeguards the national forests by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

House Report at 2.

In the Senate the bill was referred to the Committee on Interior and Insular Affairs. *See* S. Rep. No. 2696, 84th Cong., 2d Sess. (1956). That Committee neither debated nor even mentioned the phrase at issue in this lawsuit. CR 27, ex. 12. The Senate Committee Report repeated verbatim the House Report

except that in an introductory paragraph, the Report stated, "[a]llotments may be made in national forests if the land is chiefly valuable for agriculture or grazing purposes, or if the native had occupied the land prior to the establishment of the forest." S. Rep. No. 2696, 84th Cong., 2d Sess. 1 (1956).

The departmental regulation which House Bill 11696 intended to enact into law was construed by the Department of the Interior only one time prior to 1956. App. 7a. In the *Application of Jack Gamble,* BLM File A-17456, the Director of the Bureau of Land Management[5] ruled, on appeal, that an application was founded on occupancy prior to the establishment of the forest where the applicant could show that he and his ancestors had used the land in a direct and continuous chain of occupancy since a time before the forest was withdrawn. CR 27, ex. 25, at 22. In his own case Jack Gamble showed a chain stretching back to a time prior to the forest withdrawal which included his mother, her aunt, and his father. *Id.*

In the years immediately subsequent to enactment of the 1956 amendments, the Department of the Interior ruled in only two cases which required construction of the statutory language at issue here. In each case the Department permitted an allotment, if founded on occupancy by the applicant and his direct ancestors since a time prior to establishment of the forest. *See Application of Charles G. Benson,* BLM File J-011549, and *Application of John Littlefield,* BLM File J-010699, CR 27, ex. 26, 27.

Approximately twenty years after enactment of the 1956 amendments, the Department of the Interior issued a series of decisions which adopted the opposite view—that the applicant must personally occupy the land prior to the establishment of the forest. App. 7a. Among these decisions, which are all the subject of this lawsuit, was the case of Albert Shields, Sr.

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[5] Though holding the same office, this was a different individual than the Director who proposed the language adopted by Congress in the 1956 amendments. *See supra* note 4.

On April 17, 1972, the Bureau of Indian Affairs filed a Native allotment application on behalf of Albert Shields, Sr. A field examination was made by the Bureau of Land Management ("BLM") in 1974. Although the examiner found that Mr. Shields had used the land extensively,[6] he found that his *personal use* did not predate the 1909 withdrawal. CR 27, ex. 4. Accordingly, the BLM rejected the application.

On appeal, the Interior Board of Land Appeals acknowledged Mr. Shields' extensive use, but denied his claim because, "[u]nfortunately, the law was so framed that appellant's use does not qualify him for an allotment." *Albert Shields, Sr.*, 23 I.B.L.A. 188 (Jan. 5, 1976). In a series of consolidated decisions issued in the mid-1970's, almost 200 allotments, including virtually every pending application in Southeast Alaska,[7] were similarly denied. *See* App. 7a.

This action was filed in federal district court on February 23, 1977. App. 3a. Jurisdiction was conferred by 28 U.S.C. § 1353 (1976) and 25 U.S.C. § 345 (1963). On January 9, 1981, the District Court for the District of Alaska granted summary judgment for the government, holding that Alaska Natives applying for allotments within a national forest under the 1906 Act must demonstrate personal, rather than ancestral, occupancy of the land prior to the establishment of the forest. *Shields v. United States,* 504 F. Supp. 1216 (D. Alaska 1981).

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[6] The field examiner stated in his report:

> I examined this case and believe the applicant has used the subject land and if any native of Alaska deserves an allotment, Albert Shields, Sr., *does.*

CR 27, ex. 4, at 2 (emphasis in original).

[7] A few applicants are sufficiently old that their use may qualify them for an allotment, even under the government's construction. For example, the BLM recently issued a Contest Complaint against Annie Bennett, asking her to prove personal use and occupancy prior to a forest withdrawal. BLM File AA-7017; *see also* Annie Bennett (On Reconsideration), 61 I.B.L.A. 282 (Feb. 2, 1982). Mrs. Bennett is 86 years old. *Id.*

On appeal the Court of Appeals for the Ninth Circuit affirmed. App. la-9a. In affirming the district court, the Ninth Circuit first found that the language of the 1956 amendments was ambiguous. App. 5a. The court then held that administrative interpretations of the statutory language at issue, which were consistent with petitioners' claims and which were made at the time of the statute's enactment, were not due deference because they were unpublished. App. 7a. The court further held that administrative interpretations made twenty years after enactment of the statute were due deference because they were published. App. 8a. Finally, the court stated that a phrase contained in the Senate Report on the Act "indicates that personal, rather than ancestral, use is required." App. 6a.

REASONS FOR ISSUING THE WRIT

Certiorari should be granted to review the decision of the Ninth Circuit Court of Appeals because that decision conflicts with settled law as expressed in the decisions of this Court and because this case raises an important federal question deserving this Court's attention.

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

In its opinion the court of appeals expressly acknowledged that in *every* instance in which the Department of the Interior interpreted the phrase "founded on occupancy," either shortly prior[8] or subsequent to enactment of the 1956 amendments, the Department adopted the construction sought by Mr. Shields. App. 7a. Nevertheless, the court refused to defer to this administrative interpretation because the departmental actions "were unpublished and of little precedential value."

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[8] Departmental interpretation prior to enactment of the law is relevant because Congress expressly intended to enact the substance of existing administrative regulations. House Report at 4.

Id. Instead, the court chose to defer to the non-contemporaneous, but published, decisions of an administrative review board not even in existence at the time of enactment of the 1956 amendments. By this holding the court of appeals has substantially altered and narrowed this Court's rules of statutory construction that a court should defer to the interpretation given a statute by the officers or agency charged with its administration and should give "controlling weight" to administrative construction of a regulation of the agency. *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

The rule that courts should defer to the contemporaneous and practical interpretation of a statute or regulation by those officials charged with its administration is longstanding. *See Edwards's Lessee v. Darby,* 25 U.S. (12 Wheat.) 131, 133 (1827); *United States v. Moore,* 95 U.S. 760, 763 (1877); *Brown v. United States,* 113 U.S. 568, 571 (1885); *United States v. Hill,* 120 U.S. 169, 182 (1887). It has been utilized in every federal circuit court and by virtually every state court. *See* 2A C. Sands, *Sutherland Statutory Construction* § 49.03, n.1 (4th ed. 1973) and cases cited therein. The utility of this rule has not diminished in recent years. *See, e.g., Blum v. Bacon,* _____ U.S. _____, 102 S. Ct. 2355 (1982); *United States v. Clark,* 454 U.S. 555 (1982); *Watt v. Alaska,* 451 U.S. 259 (1981). The decision of the court of appeals does not abolish this rule—indeed the decision purports to follow the rule—yet it alters the application of the rule in a fundamental way.

The rule that courts should defer to contemporaneous administrative interpretation was born of practical necessity. Courts cannot delve into the minds of legislators to ascertain their intent. Therefore, where the language of a statute is ambiguous, the court must resort to extrinsic aids. The contemporaneous and practical interpretation of a statute given by those who execute it has therefore been given great weight in such instances. Note, *The Supreme Court on Administrative Construction As A Guide In The Interpretation Of Statutes,* 40 Harv. L. Rev. 469, 470 (1926-27). This deference is based

on the court's belief that legislative inaction in the face of executive action is an implicit recognition of the validity of the interpretation; that the officials involved are usually able men, with expertise in the area; that they are frequently draftsmen of the legislation they later enforce; and that the public has relied on their interpretation and governed its affairs accordingly. *Id.; see Robertson v. Downing,* 127 U.S. 607, 613 (1888); *Hahn v. United States,* 107 U.S. 402, 406 (1882); *United States v. Moore,* 95 U.S. 760, 763 (1877).

Initially the application of this rule of construction was based primarily upon the unpublished and practical construction of statutes by those officials who actually implemented the statutes. *See, e.g., United States v. Hill,* 120 U.S. 169, 182 (1887); *Brown v. United States,* 113 U.S. 568, 571 (1885); *United States v. Moore,* 95 U.S. 760, 763 (1877); *Edwards's Lessee v. Darby,* 25 U.S. (12 Wheat.) 131, 133 (1827).

In recent years, the proliferation of formal rulemaking and intra-agency appellate boards has resulted in a great deal of formal published interpretations of statutes by agencies. The courts have generally deferred to these forms of agency action as well. *See, e.g., Blum v. Bacon,* _____ U.S. _____, _____, 102 S. Ct. 2355, 2361 (1982); *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566 (1980); *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 648 (1978). Nevertheless, unpublished agency practice continues to be recognized as a legitimate aid to statutory construction.[9] *See, e.g., Quern v. Mandley,* 436 U.S. 725, 738 (1978); *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205, 210 (1972); *Udall v. Tallman,* 380 U.S. 1, 16 (1965). For example, in *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 660 (1976), this Court found an unpublished practice—the wording of allotment trust patents—to be due deference.

[9] Ironically, the very case to which the court below cited in holding that where it can defer to published administrative interpretation it need not apply the canon of liberal construction, was a case in which the court relied on unpublished administrative practice discovered by examination of the public land records. *Compare* App. 8a *with* Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 431-32 (9th Cir. 1967), *cert. denied,* 389 U.S. 1046 (1968).

By its decision in this case, the Ninth Circuit has held that contemporaneous but unpublished practice must give way to a subsequent non-contemporaneous practice solely because that later practice was formally published.[10] This ruling gives a dignity and importance to the formal publication of decisions by intra-agency appellate boards which neither this Court nor any circuit court has previously given. It in fact directly contravenes this Court's decision in *Watt v. Alaska*, 451 U.S. 259, 272 (1981), where the Court specifically found that an unpublished agency practice, contemporaneous with the enactment of a statute, was entitled to greater deference than the published formal decision of the Department ten years later. *Cf. General Electric Co. v. Gilbert*, 429 U.S. 125, 140-42 (1976).

If left to stand, the decision of the Ninth Circuit will encourage and permit succeeding administrations to manipulate the meaning of past congressional enactments by construing those enactments with more formality than had been done in the past. It will subvert the logical basis for the rule of deference to administrative practice and may ultimately serve to destroy its persuasiveness.

II. THIS CASE RAISES AN IMPORTANT FEDERAL QUESTION DESERVING THIS COURT'S ATTENTION

In its opinion, the Ninth Circuit determined that the phrase "founded on occupancy of the land prior to the establishment of the particular forest" required an allotment applicant to prove personal, rather than ancestral, use of the land prior to the forest withdrawal. Because most of the forest land at issue was withdrawn by 1909, this ruling effectively means

[10] The administrative decision in the case of Jack Gambell to which the court of appeals would not defer was made on appeal by the highest official of the BLM. It was not published because no automatic mechanism for publication existed. Neither the contemporaneous decisions nor the later decisions to which the court did defer were published in Public Lands Decisions volumes.

that only a handful of very old Alaska Natives in Southeast Alaska will have a chance of obtaining a trust patent to the land which they and their forebears have used and occupied for generations.

Traditionally this Court has taken a strong interest in Indian allotment issues, finding them to be worthy of review even when they focus on narrow interpretive issues of a statute. *See, e.g., Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976); *United States v. Jackson,* 280 U.S. 183 (1930); *United States v. Payne,* 264 U.S. 446 (1924); *LaRoque v. United States,* 239 U.S. 62 (1915). This interest is well deserved, for a claim to land historically used by Indian people is an issue of great importance. Such land is both a link to the past and the cornerstone of the future of a people. It is inextricably bound up in their culture and their way of life.

These considerations are present in this case. The land which the applicants seek is by definition land upon which they have built cabins, smokehouses, and fish racks; land which they use for hunting, fishing, trapping, and other subsistence activities. It is, moreover, land which, again by definition, has been used by their parents, grandparents, and other forebears in similar ways. Finally, it is land and a way of life which, like the late Albert Shields, Sr., they seek to offer to their children.

One measure of the importance of these allotments can be found in Joint Resolve 34 of the Alaska State Legislature. Recent years have frequently found Indians and state governments in bitter confrontation with each other over land and treaty claims. Yet in 1981 a unanimous Alaska Legislature took the unusual step of passing a joint resolution stating the legislature's support for allotments on lands traditionally used by Alaska Natives and urging the Secretary of the Department of the Interior to resolve "equitably and expeditiously" the allotment applications at issue in this lawsuit. Alaska J. Res. 34, 12th Leg., 1981 Alaska Sess. Laws.

Thus even were the statutory issue in this case determined to be a narrow one, limited in effect to a few hundred allotments in the national forests,[11] petitioners submit that the issue is an important one, deserving of this Court's attention.

Moreover, it is not clear that the opinion of the court of appeals is so limited. In its memorandum in support of its cross-motion for summary judgment in *Akootchook v. Watt,* No. F-82-4 (D. Alaska, filed Jan. 15, 1982), the United States has argued that the court's construction of the phrase "founded on occupancy" in *Shields* is controlling on the question of whether members of a class in excess of 150 applicants are entitled to allotments in other types of federal withdrawals. If the district court agrees, the ruling will impact allotment claims in still other withdrawals. Review by this Court will therefore have a legal impact far beyond the confines of this particular case and may well determine the legal status of a broad range of Native allotment cases in Alaska.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 4, 1983

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[11] The amount of land at stake in this lawsuit, a maximum of 32,000 acres, is admittedly not large when viewed against the total of 23,000,000 acres in the Tongass and Chugach Forests. Yet when viewed in the context of the individual applicants who use the land for their subsistence, it may well represent all that they have in life.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT SHIELDS, JR., Heir of Albert Shields, Sr., et al.,	)	No. 81-3120
	)	DC No. A-77-66 CIV
Appellants,	)	
vs.	)	ORDER
UNITED STATES OF AMERICA, et al.,	)	(Filed Feb. 7, 1983)
Appellees.	)	

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Before WRIGHT, SKOPIL, and ALARCON, Circuit Judges

The Clerk is directed to withdraw the prior memorandum decision of November 10, 1982 in this case and substitute the attached opinion. Appellants' petition for rehearing and suggestion for rehearing *en banc* is denied with leave to refile based upon the substitute opinion.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT SHIELDS, JR., Heir of Albert Shields, Sr., et al.,	)	No. 81-3120
	)	DC No. A-77-66 CIV
Appellants,	)	
vs.	)	
UNITED STATES OF AMERICA, et al.,	)	OPINION
	)	(Filed Feb. 7, 1983)
Appellees.	)	

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and submitted June 8, 1982

Before: WRIGHT, SKOPIL, and ALARCON, Circuit Judges

SKOPIL, Circuit Judge:

Appellant class, approximately 200 applicants for allotments under the 1906 Alaska Native Allotment Act, appeal a district court decision holding that the Allotment Act requires the applicant to establish personal, rather than ancestral, use and occupancy of the land prior to its withdrawal for national forests. We affirm.

I.

In 1906 Congress passed the Alaska Native Allotment Act, Pub. L. No. 171, 34 Stat. 197 (amended 1956, repealed 1971), which authorized the Secretary of the Interior to grant Alaska

Natives allotments of up to 160 acres. In 1956 Congress amended the Allotment Act. Act of Aug. 2, 1956, Pub. L. No. 931, 70 Stat. 954 (codified at 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed 1971)) ("Allotment Act").[1] The text of the 1906 Allotment Act became section 1, and was amended to allow alienation. Section 2 provided that allotments in national forests could be made

> "if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes."

Section 3 provided that no allotment (whether in or outside a national forest) could be made except on proof of five years "substantially continuous use and occupancy" by the applicant.

On December 13, 1971 Albert Shields, Sr. filed an application for an allotment of 160 acres of land presently within the Tongass National Forest. The land for which he applied had been withdrawn for national forest use by presidential proclamation on February 16, 1909. Mr. Shields alleged that his grandfather had lived on this land beginning in the 1850's. Mr. Shields was born in 1915, and his use of the land began in 1920. The BLM rejected Mr. Shields' application for allotment because he had failed to demonstrate either personal use prior to the withdrawal or that the land was chiefly valuable for agricultural grazing purposes. The Interior Board of Land Appeals ("IBLA") rejected Mr. Shields' appeal for the same reasons. 23 IBLA 188 (January 5, 1976).

Mr. Shields filed this action in district court in the District of Columbia on February 23, 1977 to review the IBLA denial of the application for allotment. The case was transferred to the District of Alaska on motion of the United States. The

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[1] The allotment Act was repealed by section 18 of the Alaska Native Claim Settlement Act ("ANCSA"), 43 U.S.C. § 1617, with a savings clause for applications pending on December 18, 1971. 43 U.S.C. § 1617(a).

plaintiff, Albert Shields, Sr., died on November 13, 1977 and Albert Shields, Jr. was substituted as plaintiff.

The district court certified a plaintiff class of all Alaska Natives who had made timely application for allotments under the Alaska Native Allotment Act for land located within a national forest whose applications had been denied on the grounds that they cannot establish personal occupancy of that land prior to the forest withdrawal. Both sides filed cross-motions for summary judgment.

On January 9, 1981 the district court granted the government's motion for summary judgment and held that Alaska Natives applying for allotments within a national forest under the 1906 Alaska Native Allotment Act must establish personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest. *Shields v. United States*, 504 F. Supp. 1216 (D. Alaska 1981).

II.

The sole issue before us is whether Alaska Natives applying for allotments within a national forest under the Alaska Native Allotment Act must establish personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest.

III.

Section 2 of the Alaska Native Allotment Act, as amended in 1956, provides:

> "Sec. 2. Allotments in national forests may be made under this Act if *founded on occupancy of the land prior to the establishment of the particular forest* or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes."

43 U.S.C. § 270-2 (1970) (repealed 1971)(emphasis added). The government contends the statute requires that the applicant must personally have occupied the land prior to the withdrawal; appellant claims that occupancy by a direct ancestor is sufficient.

In interpreting statutes the court's objective is to ascertain the intent of Congress. *Philbrook v. Glodgett,* 421 U.S. 707 (1975). The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used. *Hughes Air Corp. v. Public Utilities Comm.,* 644 F.2d 1334 (9th Cir. 1981). The language of the statute, however, does not aid our search for congressional intent. The statute does not indicate whether personal or ancestral occupancy is required.

Appellants argue that unless section 2 is read to require only ancestral occupancy, the additional requirement of five years use and occupancy in section 3 would be rendered meaningless, in violation of the rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless. *Hughes Air Corp., supra,* at 1337; *Jacobson v. Rose,* 592 F.2d 515 (9th Cir. 1978), *cert. denied,* 442 U.S. 930 (1979); *Patagonia Corp. v. Board of Governors of Federal Reserve System,* 517 F.2d 803 (9th Cir. 1975). This argument is meritless. The section 3 five year occupancy requirement applies to allotments under both sections 1 and 2. Section 1 authorizes allotments from any public lands in Alaska, while section 2 authorizes allotments under specific conditions from national forest lands. Thus, the personal occupancy requirement of section 3 has meaning as applied to section 1 allotments, regardless of the interpretation of section 2.

Because the language of the statute does not reveal congressional intent, we must look to the legislative history. *Heppner v. Alyeska Pipeline Service Co.,* 665 F.2d 868 (9th Cir.

1981). The 1956 amendments to the 1906 Alaska Native Allotment Act began as a House bill, HR 11696. The House Report states that sections 2 and 3 "[safeguard] the national forests by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest...." H.R. Rep. No. 2534, 84th Cong., 2d Sess. 2 (1956) [hereinafter cited as House Report]. Congress was concerned that the 1956 amendments which permitted alienation of allotments would allow some natives to secure land in National Forests for the purpose of selling it. *Id.*

The Senate Report clearly states that "[a]llotments may be made in the national forests...*if the native had occupied* the land prior to the establishment of the forest." S. Rep. No. 2696, 84th Cong., 2d Sess. 1, *reprinted at* 1956 U.S. Code Cong. & Ad. News 4201, 4202 (emphasis added). This indicates that personal, rather than ancestral, use is required.

Both the House and Senate Reports are clear that sections 2 and 3 were "enacting into law the substance of the Department's present regulations on the subject" of allotments. House Report at 4; Senate Report at 4, *reprinted in* 1956 U.S. Code & Ad. News at 4204. We therefore look to the Department of the Interior's contemporaneous regulations for the interpretation of "occupancy."

The early regulations of the Department of the Interior relating to allotments within national forests required that allotments must be "founded on *actual* occupancy prior to the establishment of the forest." 48 L.D. 70, 71 (1921); 50 L.D. 27, 48 (1923); 51 Pub. Lands Dec. 145, 145-46 (1925) (emphasis supplied). In 1935 the Department dropped the word "actual" from its regulations, and from then on utilized the "founded on occupancy" language that was subsequently enacted into the amended Alaska Native Allotment Act. 55 Interior Dec. 282, 283 (1935); 43 C.F.R. § 67.7 (1938-1954); 43 C.F.R. § 67.2 (1958); 43 C.F.R. § 2212.9-2(c) (1965); 43 C.F.R. § 2561.0-8(c) (1977). The regulations contain no explanation of what is meant

by the term "occupancy," nor any indication that the deletion of the word "actual" indicated a change in legal rights.

The administrative practice with regard to these regulations at the time of the 1956 amendments gives little aid in determining the meaning of the term "occupancy." There has been minimal implementation of the Native Allotment program. *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1015 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980); S. Rep. No. 405, 92d Cong., 1st Sess. at 91 (1971). As of the time of congressional consideration of the 1956 amendments, a total of 79 allotments had been made pursuant to the 1906 Act. House Report at 3. There are very few reported decisions of the Department of the Interior regarding these allotments. The earlier published decisions do not address the issue in this case, as they involved natives whose personal use of the land predated the establishment of the national forest (the national forest having been recently established). *Yakutat & Southern Railway v. Setuck Harry, Heir of Setuck Jim*, 48 L.D. 362 (1921); *Frank St. Clair*, 52 L.D. 597 (1929).

In several unpublished decisions in the 1950's the Bureau of Land Management permitted allotments on the basis of ancestral rather than personal occupancy. *Jack Gamble*, Anchorage 017456 (August 10, 1951) (decision by Director of BLM); *Charles G. Benson*, Juneau 011549 (August 24, 1961); *John Littlefield*, Anchorage 133471 (April 28, 1961). However, these decisions were unpublished and of little precedential value.

Since the 1956 amendments the only published I.B.L.A. decisions regarding allotments, involving about 200 consolidated cases in the 70's, held that personal occupancy was required by the Allotment Act. *Louis P. Simpson*, 20 I.B.L.A. 387 (June 16, 1975), petition for reconsideration denied, 41 I.B.L.A. 229 (Oct. 30, 1975); Mary Y. Paul, 21 I.B.L.A. 223 (July 31, 1975); *Christine Laverne Hanlon*, 23 I.B.L.A. 36 (December 2, 1975); *Estate of Benjamin Wright*, 23 I.B.L.A. 120 (December 23, 1975); *Nadja Davis Gamble*, 23 I.B.L.A.

128 (December 23, 1975); *Albert Shields, Sr.*, 23 I.B.L.A. 188 (January 5, 1976); and *Arthur R. Martin*, 41 I.B.L.A. 224 (June 27, 1979). The Board dismissed the 1950's decisions of *Gamble*, *Benson*, and *Littlefield* as possibly erroneous and nonprecedential. *Louis P. Simpson, supra*, 41 I.B.L.A. 229 (petition for reconsideration).

Appellants argue that they should prevail because ambiguous language should be construed in favor of the natives. When unresolved ambiguity exists, this court has applied that familiar canon of statutory construction. *E.g., Escondido Mutual Water Co. v. F.E.R.C.*, 692 F.2d 1223, 1236-37 (9th Cir. 1982); *Rehner v. Rice*, 678 F.2d 1340, 1348 (9th Cir.), *cert. granted*, 51 U.S.L.W. 3339 (Nov. 1, 1982). Nonetheless, we agree with the district court that the canon is but a guideline and not a substantive law. *Shields*, 504 F.Supp. at 1219, n.25. The canon of construction cannot be used by the courts to accomplish what Congress did not intend. *Andrus v. Glover Construction Co.*, 446 U.S. 608, 619 (1980). Nor can the canon be used to judicially legislate. *Blackfeet Tribe of Indians v. Groff*, _____F.2d _____, No. 81-3041, slip op. at 5838 (9th Cir. Dec. 14, 1982).

Here, the language of the statute is not conclusive. Nevertheless, the legislative and administrative history is sufficient for us to construe the intent of Congress. Further, it is appropriate to give great weight to the construction given to a statute by the agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). For example, in *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968), we were presented with an ambiguous statute with no enlightening legislative history. We declined to apply the canon of liberal construction because we found sufficient administrative practice to warrant judicial deference. *Assiniboine*, 378 F.2d at 432.

CONCLUSION

After reviewing the legislative and administrative history, we conclude that Congress intended to limit allotments on national forest lands to those individuals whose personal occupancy antedated the withdrawal of the land for the national forest. Accordingly, the decision of the district court is AFFIRMED.

TEXT OF ALASKA NATIVE ALLOTMENT ACT
(May 17, 1906)

34 Stat. 197 as amended August 2, 1956, 70 Stat. 954; former 43 U.S.C. §§ 270-1 to 270-3. Repealed but with a savings clause for applications pending on December 18, 1971 by Pub. L. 92-203, 85 Stat. 70, 43 U.S.C. § 1617.

Sec. 1 - The Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of vacant, unappropriated, and unreserved non-mineral land in the district of Alaska or subject to the provisions of the Act of March 8, 1922 (42 Stat. 415, 48 U.S.C. §§ 376 to 377), vacant, unappropriated and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or who is 21 years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress provided, that any Indian, Aleut or Eskimo who receives an allotment under this Act, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted, and such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the non-mineral land occupied by him not exceeding 160 acres.

Sec. 2 - Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

Sec. 3 - No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.